Supreme Court, U.S.
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No. 10-39

IN THE

Supreme Court of the United States

ROBERT GIRTS,

Petitioner,

v.

CHRIS YANAI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT F. WARE
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114-1291
(216) 566-5500
Rob.Ware@thompsonhine.com

Counsel for Respondent

230613

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987), this Court reaffirmed the long-standing practice that allows a court to issue a conditional writ of *habeas corpus*, which acts as an accommodation to the State in order to allow it to release or retry a successful habeas petitioner within a prescribed period of time. Neither *Hilton*, nor any of the Court's other cases, however, have clearly set out the ramifications to the State for its failure to comply with the terms of a conditional writ. This case asks the Court to resolve a divide amongst lower courts regarding the circumstances under which a *habeas* court should bar a state from retrying a successful *habeas* petitioner after the state fails to comply with the terms of a conditional writ. The questions presented are:

1. Where the state has, in bad faith, failed to obey a court order to comply with the terms of the conditional writ of *habeas corpus*, should the state then be barred from thereafter retrying the successful petitioner?

2. Did the State of Ohio's repeated instances of deliberate prosecutorial misconduct, resulting in Petitioner's unconstitutional fifteen year imprisonment, coupled with the state's failure to comply with the conditional writ, create "extraordinary circumstances" that would prohibit retrial?

LIST OF PARTIES

The Petitioner is Robert Girts, formerly a prisoner in the Ohio Department of Rehabilitation and Correction's custody and currently under jeopardy of being tried a third time by the State of Ohio for the same crime.

The Respondent is Chris Yanai, the former Warden of the Oakwood Correctional Facility and an official of the Ohio Department of Rehabilitation and Correction. The Office of the Ohio Attorney General, which has represented Respondent in the courts below, is being served on behalf of Mr. Yanai and the State of Ohio.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Robert Girts respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 600 F.3d 576. It is reprinted in the Appendix at App. 1a.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on March 29, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 9 of the United States Constitution provides, in relevant part:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

28 U.S.C. § 2243, in relevant part, states:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order

> directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> * * *
>
> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT

The writ of *habeas corpus* dates to at least the adoption of the Magna Carta and is a bulwark of liberty, protecting individuals from abuse and unjust imprisonment by the State. In *Hilton v. Braunskill*, 481 U.S. 770 (1987), this Court reaffirmed a long-standing and basic principle of *habeas* law, that of the conditional writ. The conditional writ delays a successful petitioner's release from imprisonment as an accommodation to the state in order to allow it to correct its constitutional violation. *Id.* at 775. This is a case about the consequences to the state for its failure to comply with the terms of a conditional writ, thereby wrongfully extending the unconstitutional imprisonment of a successful *habeas* petitioner. The State of Ohio has twice tried Petitioner Robert Girts for the aggravated murder of Diane Girts, and twice its convictions have been overturned due to the State's intentional misconduct. When its second failed prosecution was reversed, the State, without justification or legitimate excuse, did not comply with the terms of the conditional writ, resulting

in Petitioner's continued detention beyond the 180-day conditional writ period established by the United States Court of Appeals for the Sixth Circuit. The courts below are divided on the appropriate remedy for such conduct, but what is clear from the pattern of abuse is that the State's persecution of Mr. Girts must be stopped.

1. In early 1993, Petitioner was indicted for aggravated murder by a grand jury in Cuyahoga County, Ohio. App. 2a. At the ensuing trial, Petitioner testified in his defense. App. 2a. During cross-examination, the prosecutor asserted that Petitioner confessed guilt to another prisoner, but the State failed to produce the prisoner to whom Petitioner had allegedly confessed. The appellate court found that the prosecutor made this accusation without a good faith belief that Petitioner had actually confessed. App. 3a; 35a-36a. The appellate court reversed Petitioner's conviction, holding that the State's conduct "flew in the face of the Constitution." App. 35a. Despite such egregious conduct, Petitioner remained imprisoned while awaiting a second trial.

2. The State brought Petitioner to trial a second time. Petitioner chose not to testify at his second trial, a point that the prosecutor emphasized repeatedly to the jury during closing argument, suggesting on three separate occasions that Petitioner's silence should be taken as proof of his guilt. App. 3a; 36a-37a. Those repeated statements were improper and were found by the Sixth Circuit to reflect "flagrant" prosecutorial misconduct by the State of Ohio. App. 3a. The court below conditionally granted Petitioner's petition for a writ of *habeas corpus*, remanding the case to the United States District Court for the Northern District of Ohio

"with instructions to order Petitioner's release from custody unless the State of Ohio grants Petitioner a new trial within 180 days." App. 4a. The conditional writ was entered by the Northern District of Ohio on April 14, 2008, giving the State until October 11, 2008 to either release or retry Petitioner. *Id.* During the 180 day period, the State failed to take appropriate steps to either release or retry Petitioner. App. 38a. Accordingly, although Petitioner had successfully obtained relief from two unlawful convictions, he remained unconstitutionally imprisoned.

On October 8, 2008, only three days before the expiration of the conditional writ, the State of Ohio filed a motion in the district court seeking an extension of the conditional mandate. App. 4a. The district court granted the State's motion, but on October 10, 2008, Petitioner sought reconsideration from the district court, noting that the court was without jurisdiction to modify the terms of the Sixth Circuit's mandate. App. 4a; 38a n. 3. While the motion for reconsideration was still pending, the State, on October 14, 2008, three days after the conditional writ period expired, requested that the state court judge summon Petitioner from state prison in order to bring him before hastily arranged proceedings that evening in state court. App. 4a.

On November 3, 2008, the Northern District of Ohio reconsidered its October 9, 2008 decision and ordered Petitioner's unconditional release no later than November 6, 2008. App. 5a. On November 5, 2008, almost one month after the expiration of the conditional writ, the State filed a "Notice of Compliance" with the

district court, stating that it had "released" Petitioner from the State of Ohio's custody and into the custody of the Cuyahoga County Sheriff. App. 5a.

Thereafter, on November 6, 2008, the district court clarified the scope of its unconditional writ, holding that although it was "an extremely close question on the facts," the State of Ohio was not barred from retrying Petitioner. App. 5a. The trial court found, however, that the State could not hold Petitioner in physical custody unless and until the State was able to obtain a constitutionally valid conviction. App. 5a. By the time of his actual release, which was ordered by the district court as a result of the State's conduct, Petitioner had served fifteen years in the state penitentiary despite never having been validly convicted of any crime. As the district court noted, "[g]iven the backdrop of a case with such extreme prosecutorial misconduct at two separate trials, this Court would have expected the State to be particularly diligent with respect to the habeas process and [Petitioner's] third trial. Instead, the State neglected the various options at its disposal." App. 42a.

3. Relying on *Satterlee v. Wolfenbarger*, 453 F.3d 362 (6th Cir. 2006), the court of appeals affirmed the district court's decision to allow retrial to proceed. Despite finding the State's conduct "troubling" for "obvious reasons," App. 17a, and that Petitioner had presented a "compelling case on a factual level," App. 25a, the court below held that the State had not inexcusably, repeatedly, or abusively failed to act within the time period prescribed by the conditional writ and thus, under *Satterlee*, retrial should not be barred. App. 25a. Because *Satterlee* was binding precedent within the

Sixth Circuit, however, the panel did not consider standards other than *Satterlee* in order to determine whether the State should be barred from retrying a successful habeas petitioner.[1]

REASONS FOR GRANTING THE PETITION

The decision from the court below widens a developing rift in the federal courts on the proper standard to which a state should be held in determining whether to allow it to proceed with a retrial where it has failed to comply with the terms of a conditional writ. Many circuits have recognized that there are circumstances that prohibit the government from bringing successive prosecutions following the issuance of a writ of *habeas corpus*, but the circuits have developed distinctive tests that could lead to different outcomes for similarly situated petitioners.

This recurring question of constitutional law is raised every time a federal court issues a conditional writ as an accommodation to a state. When such a writ is issued, the expectation is that, in return, the state will in good faith comply with the conditions set by the federal court. Unfortunately, this does not always occur. As both courts below recognized, under currently unsettled *habeas* jurisprudence, a state may disregard the federal court's

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[1] *Satterlee* is binding authority within the Sixth Circuit and accordingly, Petitioner was compelled to argue within its framework at the court of appeals and could not assert the claim he now raises: that the proper test in determining whether retrial should be barred is the State's bad faith in its failure to comply with the conditional writ.

directives, essentially with impunity, and suffer no real penalty or sanction for having so done. App. 17a-18a; 40a-41a. Under the jurisprudence established by the court below, even a successful *habeas* petitioner essentially remains at the mercy of the state and largely outside the protection of the federal courts.

I. There is No Uniform Test by Which the Federal Courts Determine Whether to Bar a State from Retrying a Successful Habeas Petitioner Where the State Failed to Comply with the Conditional Writ.

Federal district courts have the authority to dispose of *habeas corpus* matters as "law and justice require." 28 U.S.C. § 2243. Accordingly, *habeas* courts have broad remedial power to tailor the relief afforded to suit both the complained of offense and the correspondent circumstances. *Id.*; *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987).

Therefore, if warranted by the circumstances, the lower courts generally agree that a *habeas* court may bar the state from retrying a successful petitioner. *E.g.*, *Capps v. Sullivan*, 13 F.3d 350, 352-54 (10th Cir. 1993). The courts differ, however, in the standards that they apply to determine whether a state's conduct has reached the threshold at which retrial should be barred. The courts below are in particular disagreement regarding the circumstances under which a state's failure to comply with the terms of a conditional writ should operate as a bar to retrial.

A conditional writ provides the state with a "window of time within which it might cure the error" by either taking the prescribed remedial action (often retrial or resentencing) or releasing the petitioner from unconstitutional custody. *Satterlee v. Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006); *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring) (describing a conditional writ as an accommodation accorded to the State to allow "time to replace an invalid judgment with a valid one"); *Harvest v. Castro*, 531 F.3d 737, 741-42 (9th Cir. 2008) ("[C]onditional orders are essentially accommodations accorded to the state."). Federal courts provide this accommodation to the state with the expectation that, in return, the state will comply with the conditions set by the federal court and will remedy its unconstitutional conduct. If, instead, the state fails to replace the invalid judgment in the allotted time period, the consequence is "always release." *Wilkinson*, 544 U.S. at 87 (Scalia, J., concurring). Where a state has *deliberately* failed to comply with the conditional writ, however, immediate release does not sufficiently remedy the violation or deter future misconduct by the state. Recognizing this, lower courts have crafted rules on how best to remedy misconduct by the state in its failure to comply with federal orders. These rules vary, however, from circuit to circuit and, in some cases, court to court.

The Tenth Circuit takes a retrospective approach, holding that a subsequent retrial should be barred if a constitutional violation occurred that would not be redressable in a new trial. *See Capps v. Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993) (holding "special circumstances" that warrant barring the retrial of a

successful habeas petitioner exist when the constitutional violation is such that it cannot be remedied by another trial, or other exceptional circumstances exist such that the holding of a new trial would be unjust). Conversely, the Eight Circuit takes a prospective approach and bars retrial only when a retrial itself would violate the petitioner's constitutional rights. *See Foster v. Lockhart*, 9 F.3d 722, 727 (8th Cir. 1993) (referring to an order barring retrial as "an extraordinary remedy that is suitable only in certain situations, such as when a retrial itself would violate the petitioner's constitutional rights."). The Sixth Circuit employs still another test, barring retrial when the state "inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or when the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial." *Satterlee*, 453 F.3d at 369. Indeed, underscoring the schism in the lower courts, at least one court of appeal, the Fifth Circuit, has questioned even whether it has the power at all to bar retrial in the event that a state fails to comply with the conditional writ. *See Smith v. Hargett*, 16 F.3d 638, 641 (5th Cir. 1994) ("Indeed, we have some doubt as to whether a federal court has the authority to enter such a prohibition.").

The district courts have applied their own tests, some going so far as to imply that the state's failure to comply with a conditional writ is sufficient reason, in and of itself, to bar retrial. *See, e.g., Morales v. Portuondo*, 165 F. Supp. 2d 601, 609 (S.D.N.Y. 2001) (noting that the courts have barred retrial "where a conditional writ has issued and the petitioner has not been re-tried within

the time period specified by the court"); *Pillette v. Berghuis*, 683 F. Supp. 2d 518, 519 (E.D. Mich. 2009) (holding that the state's inexcusable failure to comply with the conditional writ was sufficient to bar retrial). Inconsistent application of the universal principle has and can be expected to lead to different outcomes for similarly situated petitioners. This Court should grant the petition to resolve the divide in the lower courts and clarify when and under what circumstances a state should be barred from retrying a successful *habeas* petitioner.

II. The Retrial of a Successful *Habeas* Petitioner Should be Barred if the State, in Bad Faith, Fails to Comply with the Terms of a Conditional Writ.

Under the current legal framework, a state may ignore the terms of a conditional writ with near impunity, placing the burden on the petitioner to negotiate his or her eventual release. *See* App. 40a (recognizing the "inherent problem posed by a rule that effectively allows the state to ignore a conditional writ and face no consequences for having done so"). The state should not be allowed to retry a prisoner when, in bad faith, it does not comply with the timeframe established by the federal court's conditional writ of *habeas corpus*.

The conditional release is an accommodation afforded to the state. *Phifer v. Warden*, 53 F.3d 859, 864-65 (7th Cir. 1995). States should not be allowed to abuse that accommodation with no consequences:

> It is not too much to ask that, when a federal court holds that an individual has been tried,

> convicted, and imprisoned in a manner inconsistent with the Constitution of the United States, the State devise some system for assuring that the court's decision is complied with in a timely manner. If it fails to do so, it must identify some factor that would render its actions "excusable."

Harvest, 531 F.3d at 747 (analyzing the issue under the excusable neglect standard in FED. R. CIV. P. 60(b)). The *Harvest* Court correctly recognized the fundamental tension that exists when a state fails to comply with the terms of a conditional writ, but its formulation does not provide sufficiently clear guidelines or sanctions to the state, which necessarily has at least once failed to respect the successful petitioner's constitutional rights.

Although a rule that bars retrial in *all* circumstances in which a state fails to comply with the terms of a conditional writ would be too broad, a bright line rule that prohibits a state from retrying a successful *habeas* petitioner in situations where the state has, in bad faith, refused or failed to comply with the terms of the conditional writ would both provide clarity for lower courts and would allow for appropriate sanctions in those situations where the government has intentionally abused the rights of a petitioner. Absent such a bright line rule, the state has little incentive to obey orders from a federal court to release a successful habeas petitioner from his or her unconstitutional incarceration. Repeated instances of states' failures in this regard demonstrate that timely compliance with the terms of conditional writs is, at best, a low priority for the states, undermining the efficacy and legitimacy of the federal

courts' *habeas* powers. *See, e.g., Satterlee v. Wolfenbarger*, 453 F.3d 362 (6th Cir. 2006) (failing to release or retry prisoner within time frame provided by conditional writ); *Foster v. Lockhart*, 9 F.3d 722, 727 (8th Cir. 1993); *Capps v. Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993) (same); *Pillette v. Berghuis*, 683 F. Supp. 2d 518 (E.D. Mich. 2009) (noting that to permit reprosecution "would amount to an unconscionable windfall to the state . . . and would essentially reward them for their noncompliance with this Court's orders."); *Burdine v. Johnson*, 87 F. Supp. 2d 711, 713-14 (S.D. Tex. 2000).

Conversely, release from unconstitutional incarceration is of paramount importance to the petitioner. Without a clear, understandable rule and appropriate penalty for failure to comply with that rule, the burden will always fall on the successful petitioner to secure his own release, despite that his rights have been supposedly vindicated by a federal court. Under the law as it exists in the lower courts, it is most troubling that without the ability to successfully navigate the complex waters of *habeas* jurisprudence (oftentimes a challenge to seasoned attorneys), even a successful petitioner will remain imprisoned at the mercy of the state. In *Capps*, for example, the unsavvy petitioner was imprisoned for nearly *two years* following the expiration of his conditional writ. 13 F.3d at 351.

Instead of the checkered compliance with conditional writs that exists under the current state of the law, the bright line standard advocated here by Petitioner creates a clear incentive for a state to timely comply with the conditions of federal orders, promptly retry successful petitioners, and would better ensure

that defendants' constitutional rights are adequately vindicated. These are the just purposes of the Great Writ, and they are not being served under the patchwork of differing standards used by the appellate and district courts below. As between the successful habeas petitioner and the state, the state is the bad actor whose actions necessitated the intervention of the federal court. Accordingly, the state should bear the burden of ensuring that the constitutional violation has been remedied. Indeed, it is well settled that the courts should "resolve any doubt in favor of the liberty of the citizen." *Carsey v. United States*, 392 F.2d 810, 812 (D.C. Cir. 1967) (quoting *Downum v. United States*, 372 U.S. 734, 738 (1963)).

A bright line rule will not result in undue prejudice to the states. First, a state may simply release the prisoner during the conditional writ period, thereby ensuring compliance. In such an instance, the state would not then be barred from retrying the prisoner, even if the trial were to begin after the expiration of the conditional writ period. Second, states benefit from several opportunities to stay the enforcement of the writ. As the State of Ohio did in this case, a state may seek rehearing or rehearing *en banc*, automatically staying the conditional writ. FED. R. APP. P. 41(d)(1). If unsuccessful, the state may then seek a stay of the mandate for 90 days while petitioning this Court for a writ of certiorari. FED. R. APP. P. 41(d)(2). Viewing this in totality, Petitioner's proposed standard provides the states with ample opportunities to secure the retrial of a successful petitioner in a manner that respects the constitutional rights of the defendant. But where a state has, in bad faith, refused to comply with the conditional

writ, the state unilaterally circumvents the *habeas* process developed by federal courts and Congress. Petitioner submits that in such an instance, a state should forfeit its opportunity to bring a petitioner to retrial.

Finally, a bright line rule would serve the interests of judicial economy by eliminating (or at least lessening) the need for a successful *habeas* petitioner to re-litigate his or her entitlement to release from unconstitutional incarceration. Under the current framework, if a state fails to comply with the conditional writ, the petitioner must, again, file for relief from the same unconstitutional incarceration that was to be remedied by the issuance of the conditional writ. Because the state has no penalty for its failure to comply with the writ, App. 18a, it correspondingly has no incentive to release the prisoner absent further intervention from the federal courts. Indeed, additional intervention was required here. In contrast, the rule proposed by Petitioner would provide an incentive for a state to comply with the writ and, thus, would eliminate unnecessary appeals to the federal courts. Even in the event that a state nonetheless failed to comply with a conditional writ, a rule preventing retrial only in those situations where the state acted in bad faith would materially limit the scope of issues before the federal courts. Any petition or appeal would necessarily be limited to whether the state's conduct in failing to comply with the writ was in bad faith. This is in stark contrast with the myriad of fact issues that are currently litigated under the differing tests in the courts below. Because the rule of law announced by the court below materially differs from the holdings of other circuits, this Court's review is warranted.

III. The State of Ohio's Bad Faith Failure to Comply with the Conditional Writ Should Bar the State from Retrying Petitioner Girts.

Petitioner has been repeatedly victimized by the State of Ohio's bad faith since his first unconstitutional trial in 1993. The unconscionable mistreatment of Mr. Girts has continued throughout two trials infected with deliberate prosecutorial misconduct, resulting in fifteen years of unconstitutional incarceration. Then, when given yet another opportunity to cure its repeated misconduct, the State, in bad faith, failed to comply with the clear terms of the conditional writ, and it did so without any legitimate justification or excuse. Despite its repeated and outrageous conduct, the State has suffered no real penalty for its actions or its failure to comply with the orders issued by the federal courts. App. 18a. Petitioner was imprisoned for fifteen years on the basis of the State's unconstitutional conduct, it failed to comply with the conditional writ when ordered, yet the State is still free to prosecute him for yet a third time. Rather than upholding its duty to seek justice, *see Berger v. United States*, 295 U.S. 78, 88 (1935), the State of Ohio has shown that its goal is merely to keep Petitioner in prison at all costs.

In fact, while waiting on the State's decision whether to retry him, Mr. Girts spent a full year in prison after the Sixth Circuit reversed his second conviction. Petitioner remained imprisoned despite that the State's evidence was "weak and limited." App. 43a. The State took no action to begin the retrial process during the conditional writ period, preferring that Mr. Girts remain in prison, apparently without the benefit of a trial.

During the writ period, the State failed to appoint counsel to Petitioner Girts so as to allow for preparation of his defense, it failed to provide funds to Petitioner Girts so that expert witnesses could be contacted and retained, it failed to arraign Petitioner Girts, it failed to empanel a jury, it failed to set a trial date, and it failed to even bring Petitioner Girts before a state court judge during the 180 day period — doing so only after the conditional writ period expired. App. 16a-17a. In fact, counsel was not appointed for Petitioner Girts until October 14, 2008, *after* the expiration of the 180 day time period. App. 4a; 38a. Even when counsel was finally appointed he had less than five minutes to speak with Petitioner prior to the unusual after-hours proceedings before the state court judge. *Id.* Counsel's inability to prepare was directly and proximately caused by the State's inexcusable failure to advance Petitioner's case. Despite having ample time to prepare its case and notwithstanding Petitioner's fifteen year imprisonment, the State's argument has been, in essence, that Petitioner should remain incarcerated until the State is good and ready to try him for a third time, regardless of the time period set by the Sixth Circuit.

The district court was appalled at this unconscionable behavior and ordered Petitioner's immediate release. App. 5a. The following day, the State contacted the district court, requesting clarification of its ruling, specifically whether retrial was barred. App. 38a. While that motion was pending, the State "released" Petitioner to the custody of the local sheriff — only to argue on appeal that its release of Petitioner immediately divested the federal courts of jurisdiction over the case and that the court was without power to

bar Petitioner's third trial. App. 5a. From this behavior, it appears that the clarification of the district court's order was intended solely to give the State time to release Petitioner in a misguided attempt to circumvent the remedial *habeas* jurisdiction of the federal courts. Faced with *two* instances of deliberate prosecutorial misconduct, the State's response was not to be extraordinarily diligent in retrying Petitioner, App. 42a, but instead its reaction was to fail to comply with an order issued by a court of appeal and then play procedural games in an effort to escape scrutiny for its misconduct. This behavior exemplifies bad faith. *See Harvest v. Castro*, 531 F.3d 737, 747 (9th Cir. 2008). Accordingly, the State's bad faith disregard for the terms of the conditional writ should operate as a per se bar to the third retrial of Petitioner.

IV. Under the *Satterlee* Extraordinary Circumstances Test, Petitioner's Retrial Should be Barred.

Even should this Court not adopt Petitioner's proposed standard, the State's conduct is sufficiently inexcusable and extraordinary to prohibit retrial under the Sixth Circuit's *Satterlee* test. Permitting the State to bring Petitioner to a third trial cannot remedy the systematic constitutional violations that have, thus far, resulted in Petitioner's unconstitutional imprisonment for fifteen years. The State of Ohio twice intentionally deprived Petitioner with a fair trial in an effort to obtain a conviction. App. 42a. While outrageous by itself, more egregious still is that when confronted with its violations, the state took no steps to remedy its conduct or comply with the orders from federal court. Further compounding

the gravity of these violations, the State's deliberate misconduct came in a case brought on "weak and limited evidence," App. 43a, heightening the probability that an innocent man has been wrongfully imprisoned.

The shocking nature of the State's conduct in its two previous trials of Petitioner, coupled with its bad faith behavior in failing to comply with the terms of the conditional writ of *habeas corpus*, rises to the level of inexcusable and extraordinary, as defined by *Satterlee*. *Satterlee v. Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006). Indeed, both courts below repeatedly reiterated the wrongfulness of the State's behavior, noting that "there is little for this Court to praise in the State's conduct," App. 41a-42a; that the State's conduct was "troubling," App. 42a, 17a ("[f]or obvious reasons, the course of conduct by Respondent is troubling"); and that it is "appalling" Petitioner has spent fifteen years in prison on two constitutionally infirm convictions. App. 25a. Conduct that is repeatedly characterized in a such a manner should, by definition, be inexcusable and extraordinary.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's petition for writ of certiorari.

Respectfully submitted,

ROBERT F. WARE
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114-1291
(216) 566-5500
Rob.Ware@thompsonhine.com

Counsel for Respondent

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 29, 2010

UNITED STATES COURT OF APPEALS SIXTH CIRCUIT

No. 08-4592.

Robert GIRTS,

Petitioner-Appellant,

v.

Chris YANAI,

Respondent-Appellee.

Argued: Dec. 2, 2009.
Decided and Filed: March 29, 2010.

Before: BATCHELDER, Chief Judge; MARTIN and CLAY, Circuit Judges.

CLAY, J., delivered the opinion of the court, in which MARTIN, J., joined. BATCHELDER, C.J. (pp. 588-91), delivered a separate opinion concurring in the judgment only.

Appendix A

OPINION

CLAY, Circuit Judge.

Petitioner Roberts Girts appeals the district court's decision not to bar a pending third trial following the state's failure to retry Petitioner within the time provided by this Court's conditional grant of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has twice been convicted of the 1992 murder of his wife. Both convictions were subsequently overturned based on prosecutorial misconduct. The first conviction was overturned by the state court on direct appeal. The second conviction was overturned by this Court in *Girts v. Yanai*, 501 F.3d 743 (6th Cir.2007). In that decision, Petitioner was granted a conditional writ of habeas corpus calling for the release of Petitioner from custody if he was not tried within 180 days. Girts was not tried within 180 days but was released and has subsequently been rearrested for the same murder. He argues on appeal that a third trial should be barred. For the following reasons, the district court's decision not to bar retrial is **AFFIRMED.**

STATEMENT OF FACTS

Robert Girts' wife, Diane, died on September 2, 1992. Girts was indicted for aggravated murder on February 9, 1993. At his first trial, Girts testified on his own behalf. During the cross-examination of Girts, the prosecutor asked a series of questions about Girts' alleged confession to a jailhouse informant. Girts denied

the confession, and no witness was ever provided to support the prosecutor's contentions. Girts was convicted of the murder. On July 28, 1994, the conviction was reversed by the Ohio Court of Appeals on account of the blatant prosecutorial misconduct.

Girts was subsequently retried and chose not to testify. During closing arguments at that trial, the prosecution made several statements in closing argument regarding Girts' decision not to testify or to speak with police. Girts was again convicted. This Court granted Girts' habeas petition based on the prosecutorial misconduct in the second trial. We found that:

> Given the facts in this case, there is a strong likelihood that the prosecutor strategically made the prejudicial statements at the end of the trial to focus the jury's attention on Petitioner's silence, and away from the limited evidence presented at trial. The improper statements in this case constitute flagrant prosecutorial misconduct and are grounds for reversal even if trial counsel did not raise an objection.

Girts, 501 F.3d at 761.[1] We conditionally granted the habeas petition, remanding to the district court with

1. The facts of the case are accurately summarized in our previous opinion, *Girts*, 501 F.3d at 749-52, where we indicated that the district court properly noted "that the evidence against Petitioner was not overwhelming." *Id.* at 760.

instructions to order Girts' release unless the State of Ohio granted him a new trial within 180 days. Ohio sought rehearing and rehearing *en banc*. This Court denied those requests on February 19, 2008. Respondent did not seek a stay of the mandate under Federal Rule of Appellate Procedure 41, and the Court issued its mandate on March 12, 2008. The district court entered an order conditionally granting the writ on April 14, 2008. The order stated: "Petitioner's application for a writ of habeas corpus is ***CONDITIONALLY GRANTED*** as follows. *Unless the State of Ohio grants Petitioner a new trial within 180 days from the date of this Order, Petitioner is to be released from custody at that time.*" That order created a deadline of October 11, 2008 for the State to act. Respondent filed a petition for *certiorari* on May 19, 2007, and the Supreme Court denied the petition on October 6, 2008.

Two days later, on October 8, 2008, Respondent moved for a 30-day extension of time to comply with the conditional writ. The district court initially granted the motion. Girts filed a motion for reconsideration and immediate release on October 10, 2008. On October 14, 2008, while that motion for reconsideration was pending, the state hurriedly convened a pretrial hearing, presumably in anticipation of a retrial, but despite the fact that the state was still holding Girts under the authority of the not-yet-vacated prior conviction for the same crime. Girts was appointed counsel, who was provided only five minutes to meet with Petitioner and who objected to the hastily convened proceedings. No bail was set at the hearing.

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On November 3, 2008, the district court granted the motion for reconsideration and entered an unconditional writ of habeas corpus, calling for Petitioner's release no later than November 6, 2008. A formal written memorandum and order was issued on November 5, 2008. Respondent filed a "Notice of Compliance" on November 5, 2008, stating that it had released Girts from state prison into the custody of the county sheriff's department. Respondent requested a finding on whether it could retry Girts, and on November 6, 2008, the district court clarified its order, stating that, while it was an "extremely close question," Respondent could retry the prisoner. The district court also stated, however, that Girts could not be returned to the state's physical custody until Respondent obtained a valid conviction. On that same day, Girts was placed on supervised release, and Respondent has not appealed the district court's order releasing Girts pending a retrial.

DISCUSSION

I. Jurisdiction

We review a district court's disposition of a habeas petition *de novo*. *Eddleman v. McKee*, 586 F.3d 409, 412 (6th Cir.2009).

Defendant argues that our recent decision in *Eddleman* forecloses federal jurisdiction because Girts is no longer in custody. In *Eddleman*, the Court reversed the district court's decision barring retrial

where Michigan had failed to retry a petitioner who had secured a conditional grant of the writ of habeas corpus during the prescribed period. The prisoner in that case had already had the defective conviction set aside by the state when the district judge considered the motion to bar retrial. "For federal habeas jurisdiction to exist under § 2254, therefore, a state prisoner must be held pursuant to a *judgment*-rather than, say, an indictment or criminal information . . . [T]he limitation . . . means that, once the unconstitutional judgment is gone, so too is federal jurisdiction under § 2254." *Id.* at 413.

Eddleman is not directly on point for the situation before the Court. In *Eddleman*, this Court affirmed a district court's grant of a conditional writ for the petitioner to be retried within a "reasonable time." Our mandate issued on January 5, 2007. The district court's order required the state to retry the petitioner within 45 days of the issuance of the mandate. The following month, the petitioner was rearrested. He appeared for a hearing in state court on February 28, 2007 and agreed that his sentence, based on the improper conviction, had been "vacated." He filed a motion on March 1, 2007 requesting an order barring a subsequent trial. The order was denied. The state court was slow to retry Eddleman, and he renewed his motion in federal court for an unconditional writ barring reprosecution on November 19, 2007. The district court agreed and ordered the release of petitioner on January 22, 2008. On February 5, 2008, the order was clarified to bar Michigan from reprosecuting the petitioner. Therefore, the district judge's order barring retrial was issued

almost a year after Eddleman was rearrested on the new charges and more than eleven months after Eddleman himself agreed that the improperly obtained conviction had been "vacated."

In this case, the district court's initial order granting Petitioner's release was issued while he was still in custody on the improperly obtained conviction. He was "released" in response to the district court's order, given orally on November 3, 2007 and confirmed in writing on November 5, 2007. At that point, the district court could have entered an order barring retrial. *See, e.g., Capps v. Sullivan,* 13 F.3d 350, 351-52 (10th Cir.1993) (affirming a district court's decision to bar retrial in granting a writ following the state's failure to retry petitioner during the period of the conditional writ). Respondent reads *Eddleman* so broadly that it would prevent any appellate review of a district court's order barring or declining to bar a subsequent prosecution. Defendant argues that "once the Warden released [Petitioner], habeas jurisdiction ended." (Defendant Br. at 15). Since the district court had the authority to release the prisoner, Respondent's theory means it could not have appealed an order granting release and barring retrial if the district court had been inclined to bar retrial.

This extremely broad reading of *Eddleman* cannot be reconciled with our previous decision considering when a federal court could bar reprosecution in *Satterlee v. Wolfenbarger,* 453 F.3d 362 (6th Cir.2006). In that case, the district court had granted an unconditional release,

and the petitioner was not in custody during the appeal. This Court found that the district court left "ambiguous" whether the petitioner's immediate release and the expungement of his record of conviction barred retrial. "It is not clear whether the unconditional writ granted by the district court is unconditional (1) in the sense that it is effective immediately but reprosecution is permitted or (2) in the sense that it bars reprosecution." *Id.* at 370.

In this case, similar confusion took place at the district court level. The district court orally granted the unconditional writ at court proceedings held on November 3, 2008. Respondent then asked for clarification on whether the unconditional writ barred retrial. While the district court considered this request for clarification, Girts was released from state prison and transferred to the county jail on November 5, 2008. The district court's decision allowing retrial was issued less than three hours after Respondent provided notice that Girts had been transferred to county jail. In *Satterlee,* this Court raised the issue eighth months after his unconditional release, and the district court barred retrial almost nineteen months after its initial order granting release. The crucial distinction between *Satterlee* and *Eddleman* was that in *Satterlee,* the Court reviewed an initial grant of an unconditional writ, while in *Eddleman,* the district court was attempting to micro-manage subsequent state court proceedings. *See also, Gardner v. Pitchess,* 731 F.2d 637 (9th Cir.1984) (reversing district court's barring of a subsequent trial after petitioner had been granted an unconditional writ);

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Foster v. Lockhart, 9 F.3d 722, 727 (8th Cir.1993) (considering but rejecting argument that subsequent trial should be barred for petitioner who had already been released on bail, although the Court read the writ as conditional).

To reconcile *Satterlee* and *Eddleman*, the holding of *Eddleman* must be seen as merely a sensible reaffirmation of the principle announced in *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir.1985), that federal courts do not have continuing oversight of subsequent state court proceedings following the state's compliance with a grant of a conditional writ of habeas corpus. The initial determination about whether a subsequent trial should be barred is a necessary part of the grant of a writ. It is only proper that an appellate court would have jurisdiction to review that determination by the district court regardless of whether the district court found in favor of the petitioner or the respondent. The fact that the Court, in binding precedent, did just that in *Satterlee* requires us to reach such a conclusion.

Eddleman did not consider the implications of *Satterlee* in reaching its decision, relying instead on *Fisher*. *Fisher* likely compelled the decision reached in *Eddleman*, but again, the factual situation was different than that presented here or in *Satterlee*. Like *Eddleman*, the petitioner in *Fisher* at the time of the district court's order "was no longer in custody pursuant to the constitutionally defective judgment of conviction, but was being held pursuant to the indictment." *Fisher*, 757 F.2d at 791. This result, reached again in *Eddleman*,

can only be reconciled with *Satterlee* by holding that a district court, in granting the unconditional writ, can bar retrial at that time. In this case, the order being appealed was the district court's decision on what was meant by the term "unconditional writ," exactly the same issue remanded by this Court in *Satterlee* nearly a year after the petitioner had been freed from his improper conviction.

The concurrence focuses on the fact that the district court's official order declining to bar retrial was issued after Girts was technically released. The November 5, 2008 order, however, was explicitly a "clarification" based on *Respondent's* oral request that the district court state whether its grant of an "unconditional writ" meant that the state was barred from reprosecuting Girts. The concurrence appears to believe that the November 5th order was made without jurisdiction but that it would have been proper for Girts' to appeal the November 3, 2008 order. If that had occurred, per *Satterlee,* we could have remanded for clarification as to whether the district court meant to bar reprosecution. Then, sometime at the end of 2010, two years after it initially clarified its order, the district court could again decline to bar reprosecution. Girts could then appeal to this Court, and we could affirm. We prefer to allow the district court to explain contemporaneously what it meant by an "unconditional writ."[2] We do not hold that a district court

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2. The concurrence never engages with the factual predicate of *Satterlee.* We explicitly stated in *Satterlee:* "It is not clear whether the unconditional writ granted by the district (Cont'd)

can materially amend its judgment after the state has released a petitioner, and we acknowledge binding Supreme Court authority that a habeas court does not maintain "continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court." *Pitchess v. Davis*, 421 U.S. 482, 490, 95 S.Ct. 1748, 44 L.Ed.2d 317 (1975). In the unique factual setting of this case, we simply read the November 5, 2008 order as clarifying the November 3, 2008 order, in which the district court granted an unconditional writ and in which the district court was free to decide whether to bar retrial. We therefore reaffirm what has always been the case-a district court sitting in habeas has jurisdiction to consider the circumstances that exist up until either the state complies with a conditional writ or the court issues an unconditional writ, but does not have jurisdiction to consider circumstances that unfold after the state complies with the writ.

For these reasons, we hold that jurisdiction is proper.

(Cont'd)
court is unconditional (1) in the sense that it is effective immediately but reprosecution is permitted or (2) in the sense that it bars reprosecution." 453 F.3d at 370. The November 3, 2008 order also "is not clear" whether retrial was barred, and it certainly aids our review to have the district court clarify what it meant before engaging in a time-consuming remand, even if that clarification occurred after Girts was released. Had the district court not clarified its order, we could remand per *Satterlee*, and the district court could now decide to bar retrial, more than a year after Girts was released from custody.

II. "Extraordinary Circumstances"

Since we have jurisdiction to consider whether the district court's unconditional grant of habeas corpus should have barred retrial, we now must consider whether Girts may be tried a third time, following two trials whose verdicts were reversed due to blatant prosecutorial misconduct. Girts' primary argument is that since Respondent failed to try him during the period allowed by the conditional writ of habeas corpus, it should now be prevented from trying him a third time. "In a typical case in which a prisoner is released because a state fails to retry the prisoner by the deadline set in a conditional writ, 'the state is not precluded from rearresting petitioner and retrying him under the same indictment.' " *Satterlee*, 453 F.3d at 370 (quoting *Fisher*, 757 F.2d at 791). In *Satterlee*, the Court noted that "in 'extraordinary circumstances,' such as when 'the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or if the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial,' a habeas court may 'forbid reprosecution.' " *Satterlee*, 453 F.3d at 370 (quoting 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 33.3 (5th ed.2005)).[3]

3. The concurrence would refuse to follow binding precedent simply because it disagrees with it. *Satterlee* remains "controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision." *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir.2001).

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We review the district court's decision to grant or deny a writ of habeas corpus *de novo;* however, the district court's factual findings will not be disturbed unless they are clearly erroneous. *Dunlap v. United States,* 250 F.3d 1001, 1004 (6th Cir.2001). Respondent argues that the question of "extraordinary circumstances" should be reviewed for clear error because it is a factual determination. We disagree and believe that while the district court's factual findings must be reviewed for clear error, the legal conclusion concerning whether those facts rise to the level of "extraordinary circumstances" should be reviewed *de novo. See United States v. Jeross,* 521 F.3d 562, 581-82 (6th Cir.2008) (applying *de novo* review to a determination of "extraordinary circumstances" in the context of the sentencing guidelines).

For support of his claim of "extraordinary circumstances," Petitioner relies primarily on a district court opinion from the Southern District of New York. *Morales v. Portuondo,* 165 F.Supp.2d 601 (S.D.N.Y.2001). The decision in *Morales,* however, came at a crucially different point in the litigation and presented much more in the way of "extraordinary circumstances." The court noted three situations where federal courts have barred retrial of successful habeas petitioners: (1) where the act of retrial itself would violate the petitioner's constitutional rights, for example, by subjecting him to double jeopardy; (2) where a conditional writ has issued and the petitioner has not been retried within the time period specified by the court; and (3) where the petitioner had served extended and potentially

unjustifiable periods of incarceration before the writ was granted. *Id.* at 609. Girts presents the second possibility, but in *Morales*, the district court dealt with the third situation. In that procedural posture, the district court found a variety of reasons why barring retrial was appropriate.

> First, on the record before the Court, no reasonable jury could convict [the petitioners] of murder; indeed, the evidence strongly suggests that they are innocent. Second, [the petitioners] have been severely prejudiced by the passage of time; they have "served extended and potentially unjustified periods of incarceration" and their ability to defend against the charges in any new trial has been hampered, at least in some respects. In addition, certain aspects of the District Attorney's Office's handling of this matter are troubling; this is yet another consideration weighing against permitting a re-trial.

Id.

On the merits, Girts presents a very different case. The evidence does not "strongly suggest" that Girts is innocent. It is true that "the evidence against Petitioner was not overwhelming," leading the prosecutor at the second trial to strategically make "prejudicial statements at the end of the trial to focus the jury's attention on Petitioner's silence, and away from the limited evidence presented at trial." *Girts v. Yanai*, 501

F.3d at 760. Still, while Respondent may not have a particularly strong case against Girts, the defendants in *Morales* presented compelling evidence that they were in fact not guilty. Not only was the evidence at the petitioners' original trial "extremely thin," but subsequently, another man had confessed to the murder and absolved the petitioners. The district court found that "it is clear" that the confessing party "was *not* lying. He came forward precisely because he felt guilty that [the petitioners] had been convicted of a crime that he, not they, had committed." *Morales,* 165 F.Supp.2d. at 610-11. Furthermore, another party had confessed to the murders, although the evidence was previously excluded at trial, and another eyewitness to the murder specifically stated that neither petitioner was at the scene of the crime. The district court concluded that if the petitioners were retried, "it is hard to imagine that any reasonable jury could convict." *Id.* at 611. *Morales* simply presented a much more compelling case for the petitioners' innocence than is presented by Girts.

The difference in procedural posture also makes an apple-to-apple comparison problematic. The decision in *Morales* was made at the stage of granting the initial writ. That court declined to grant a conditional writ to provide the state a second opportunity to try the petitioners. The court relied on the evidence of the petitioners' innocence, prejudice resulting from the passage of time, and the district attorney's office's unwillingness to consider evidence contrary to its position. For the most part, Girts relies on similar evidence. He cites the fact that Respondent has twice

committed prosecutorial misconduct, the fact Girts has served fifteen years in prison without ever having been properly convicted, and notes the impact of the passage of time as prejudicial should a third trial commence.[4] All of this information was known when this Court decided to grant a conditional writ. To find for Girts, this Court must find that while the multiple instances of prosecutorial misconduct and fifteen years in jail are not sufficient to bar retrial, the added fact that Respondent did not retry Girts during the time mandated by the conditional writ sufficiently creates the "extraordinary circumstances" that a court must find to bar retrial.[5]

In *Satterlee*, this Court found that reprosecution could be barred if "the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period." In the instant case, Respondent undoubtedly did almost nothing to retry Girts during

4. We note that Petitioner has requested a stay in the state court proceedings pending the resolution of his habeas claim, undercutting some of his arguments about the scope of any injury arising by the additional delay following our grant of the conditional writ.

5. Respondent argues that in considering "extraordinary circumstances," we can look only at the conduct of the state after the conditional writ was granted. We disagree and believe that the entire universe of facts surrounding a petitioner's claim is at least relevant. This panel's previous decision to allow retrial underscores our belief that a long prison term or even two instances of prosecutorial misconduct do not automatically lead to barring retrial.

the 180-day period. The district court found that all the state did to comply was to arrange a pretrial conference on October 14th, 2008 (after the conditional writ expired): "Trial Counsel was appointed for Mr. Girts only very shortly prior to this conference, was able to spend less than 5 minutes conferring with Mr. Girts before the conference, and had no particular knowledge of Mr. Girts' case when the conference occurred." (Memorandum and Order 3-4).

Petitioner finds it inexcusable that Respondent took no steps to retry Girts during the 180-day period of the conditional writ and finds that the failure to retry him "is part of a larger pattern of ongoing constitutional violations that Mr. Girts has been forced to endure and has resulted in his imprisonment for the past fifteen years." (Pet. Br. at 22). The problem with this argument is that the failure to retry Petitioner within 180 days was not a violation of the conditional writ. The conditional writ clearly provides that Respondent could either retry him or release him, and Petitioner was released once the district court determined that Respondent was out of time.[6]

For obvious reasons, the course of conduct by Respondent is troubling. It has suffered no practical

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6. It is crucial to our analysis that the state requested and was granted an extension. Therefore, the state was technically always compliant with court orders. Absent the extension, the continued incarceration of Petitioner on the improper conviction may have presented "extraordinary circumstances."

consequence from its failure to prosecute Girts within 180 days. Nonetheless, we do not believe that barring retrial would be appropriate at this time. First, the parties have cited, and we have independently found, no case where retrial was barred in a similar situation. Instead, even after the state fails to retry the petitioner during the period of time provided in the conditional writ, the state routinely maintains the opportunity to retry the petitioner following his release.

In *Harvest v. Castro*, 531 F.3d 737 (9th Cir.2008), the Ninth Circuit confronted an attempt by the state to modify the conditional grant of habeas relief. The state neither released the petitioner nor started proceedings within the 60 days provided by the district court. The state blamed a clerical error for the delay, and upon learning that the clerical error was made, it waited three days to notify the district court, allowing the county district attorney time to file a new complaint charging the petitioner with murder. The state proceeded to file an "Application to Amend Order Nunc Pro Tunc" seeking to modify the conditional writ. The Ninth Circuit determined that modification was possible but only if the standards of Rule 60 of the Federal Rules of Civil Procedure were met. The Ninth Circuit found that the state could not satisfy those requirements and ordered an unconditional writ releasing the petitioner from custody. Despite this broad failure to comply with the conditional writ, the Ninth Circuit specifically noted: "Our granting of an unconditional writ of habeas corpus does not, itself, preclude the State from rearresting and retrying [the petitioner]." *Id.* at 750 n. 9. It specifically

cited language from the Hertz & Liebman habeas treatise relied on in *Satterlee* that "Federal courts usually permit rearrest and retrial after the time period specified in the conditional release order has elapsed and the prisoner has been released." *Id.* (quoting Hertz and Liebman *supra*, § 33.3, at 1686).

In this case, we reach the same result. When ordered to release Girts, the state complied. Nothing in our previous order forbade the state from retrying Girts. The failure to begin trial proceedings against Girts throughout the 180-day period is not something of which we approve, but the state technically complied with all court orders. We believe the district court acted properly by mandating that Girts remain free on bond throughout the third trial proceedings, but that the failure to proceed during the 180-day conditional grant, even coupled with the multiple instances of prosecutorial misconduct, do not rise to the level of "extraordinary circumstances" contemplated in *Satterlee*.[7]

III. Alleged Constitutional Injuries

Finally, Petitioner claims that a third trial would violate the Double Jeopardy Clause, his right to a speedy

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7. We emphasize, however, that federal courts retain the power to bar a subsequent trial under appropriate circumstances, and while that power should not be used except in extraordinary circumstances, it should still be invoked "as law and justice require." *Hilton v. Braunskill*, 481 U.S. 770, 775, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

trial, and pose a general due process violation.[8] We acknowledge that, generally, a petitioner "must first exhaust the remedies available in state court by fairly presenting his federal claims to the state courts." *Smith v. State of Ohio Dep't of Rehab. and Corrections*, 463 F.3d 426, 430 (6th Cir.2006). We address these issues, however, to insure that our order allowing a subsequent trial does not independently violate Girts' constitutional rights in the fluid factual scenario unfolding in the state court proceeding. We focus only on activities that occurred before the date on which Girts was released from his previous conviction, November 5, 2008. *See Douglas v. Workman*, 560 F.3d 1156, 1176 (10th Cir.2009) (holding that barring a new trial may be necessary "when the error forming the basis for the relief cannot be

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8. Respondent argues that Petitioner failed to make these arguments in the district court. We will entertain them nonetheless. In *Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 545 (6th Cir.1996), this Court held that it "has discretion to entertain novel questions." In determining whether to exercise this discretion we consider: 1) whether the issue newly raised on appeal is a question of law, or whether it requires or necessitates a determination of facts; 2) whether the proper resolution of the new issue is clear and beyond doubt; 3) whether failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial of substantial justice; and 4) the parties' right under our judicial system to have the issues in their suit considered by both a district judge and an appellate court. *Id.* In this case, the issue is purely one of law and easily decided. Furthermore, if a third trial violates Girts' constitutional rights, it is certainly more efficient to consider the issue now rather than on appeal following a subsequent trial.

corrected in further proceedings" and acknowledging that the "classic example of such an irredeemable error . . . is . . . when a new trial would violate the Double Jeopardy Clause of the Fifth Amendment") (citations and quotations omitted).

Consistent with this approach, Girts' first challenge is that a third trial would violate the Double Jeopardy Clause. Even Girts concedes that his case "is not a typical situation in which double jeopardy applies." (Pet. Reply Br. at 25). Girts argues that the Double Jeopardy Clause should protect him from "the anxiety, expense, and delay occasioned by multiple prosecutions" *Lee v. United States*, 432 U.S. 23, 32, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977), and that he should enjoy "the right . . . to have his trial completed before the first jury impaneled to try him." *Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). His strongest argument is that the prosecution intentionally committed prosecutorial misconduct in order to get a new trial. The Supreme Court has held that "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial [a defendant may] raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id.* at 676, 102 S.Ct. 2083. However, the Court specifically held that "conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id.* at 675-76, 102 S.Ct. 2083.

The general rule, however, is that a successful post-conviction appeal is considered differently than a mistrial. "[R]eprosecution for the same offense is permitted where the defendant wins a reversal on appeal of a conviction . . . . [T]he crucial difference between reprosecution after appeal by the defendant and reprosecution after a sua sponte judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal." *United States v. Jorn*, 400 U.S. 470, 484, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

We do not foreclose the possibility that egregious prosecutorial misconduct could in an extreme case implicate double jeopardy rights, but this case does not present such a scenario. Girts relies on this panel's previous statement that the prosecutorial misconduct indicated a "strong likelihood that the prosecutor strategically made the prejudicial statements." *Girts*, 501 F.3d at 761. This statement, while accurately describing the prosecution's likely motives, does not rise to the necessary level for a finding by this Court sitting in habeas that Girts' constitutional rights were violated. Based on our consideration of the record, we do not believe that the prosecution's "strategy" was to get a mistrial declared, but was instead to improperly infect the jury in the prosecution's favor. Girts' attorney did not actually object, and was thus found ineffective, and while Girts claims a mistrial would have been granted if one had been requested, this is pure speculation. The trial court could have offered a limiting instruction rather than declare a mistrial.

Girts further argues that a third trial reaches the "breaking point" and thus should be barred where double jeopardy concerns are implicated. Again, Petitioner cites no authority that this "breaking point" analysis applies to the habeas context and instead relies solely on direct appeals. *See, e.g., Carsey v. United States,* 392 F.2d 810 (D.C.Cir.1967). We have already implicitly rejected this argument by issuing a conditional writ, and we decline to depart from that previous determination.

In addition, Girts asserts that a third trial should be barred based on the speedy trial provision of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. Initially, it is unclear whether this Court can properly consider this argument on appeal. In effect, Girts is challenging the legitimacy of the pending state litigation, a claim that should be brought under 28 U.S.C. § 2241. Furthermore, Girts arguably needs a certificate of appealability in order to address this issue, which he does not have.

Even if we were to overlook these procedural hurdles, the claims fail on the merits. Petitioner cites no support for his contention that the fifteen-year delay caused by the improperly obtained conviction implicates his speedy trial rights in the habeas context. He bases his argument primarily on the factors for a speedy trial analysis discussed in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Under *Barker,* a court should consider four factors in analyzing whether a defendant's right to a speedy trial was violated: length

of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Id.* at 530, 92 S.Ct. 2182. "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). This threshold is typically assumed if the delay is longer than one year. *Id.* at 652 n. 1, 112 S.Ct. 2686.

In general, a *Barker* analysis can be done only after the trial, inasmuch as before trial, "the *Barker* prejudice criterion is indeterminate at this point." *Atkins v. Michigan*, 644 F.2d 543, 547 (6th Cir.1981). Furthermore, Girts' argument under *Barker* would arguably apply to almost every successful federal habeas petitioner when the writ is granted based on prosecutorial misconduct. All have suffered a substantial delay; all are prejudiced because the delay is more than one year; and almost all prosecutorial misconduct might be characterized as "deliberate." No court of which we are aware has considered the *Barker* factors in the setting of a post-habeas trial, and Petitioner does not offer a sufficiently compelling case for this Court to do so. This is particularly true because all of these factors were known when we granted the conditional writ, which specifically allowed for retrial.

Finally, Petitioner makes a cursory argument in favor of a due process claim, but nothing about this argument implicates the state's failure to retry him

within the 180 day window. For support, Girts relies on a footnote in a Fourth Circuit case that found an "aggregate delay" could entitle a defendant to relief. *United States v. Hall*, 551 F.3d 257, 271 n. 18 (4th Cir.2009). He cites no case law from the habeas context where a subsequent retrial was barred based on a due process violation. Furthermore, this Court's previous decision to grant a conditional writ forecloses his claim that any third trial in his situation poses a due process violation. The conduct of Respondent subsequent to the granting of the conditional writ and before the granting of the unconditional writ does not reach the level of a due process violation.

All told, Girts presents a compelling case on a factual level. While we express no opinion as to his guilt or innocence, it is appalling that Girts has spent fifteen years in prison on the basis of two constitutionally deficient convictions. It is also unfortunate that the state of Ohio did not act with all deliberate speed to retry him, instead allowing the conditional writ's 180-day period to run. Still, the law is clear that a habeas court may bar retrial only in "extraordinary circumstances," and at this point, we cannot conclude that the district court erred in finding that the delay following Girts' successful habeas petition, even combined with the previous history of the improper convictions, rises to the level of "extraordinary circumstances."

Appendix A

CONCLUSION

For the foregoing reasons, the district court's decision to grant an unconditional writ but decline to bar retrial is **AFFIRMED.**

Appendix A

ALICE M. BATCHELDER, Chief Judge, concurring in judgment only.

I concur in the judgment because I agree that it would be improper for the district court to bar the State of Ohio from retrying Robert Girts. But I disagree with the majority's reasoning in certain key respects.[1]

I do not agree that the district court had jurisdiction to decide Girts's fate after the State had released him from custody pursuant to the writ and, beyond that, I am not convinced that a federal habeas court ever has the power to bar on untimeliness grounds a State from retrying a successful habeas petitioner, though I am aware that this court has held otherwise. As for the former, we explained in *Eddleman v. McKee*, 586 F.3d 409, 413 (6th Cir.2009), that after the habeas court has vacated a conviction and the State has released the petitioner, "at that point, per the plain terms of § 2254, the district court's jurisdiction over [the petitioner]'s case [comes] to an end." Stated another way, "once the unconstitutional judgment is gone, so too is federal

1. I also disagree with the majority's characterization of the evidence against Girts as lacking and the prosecutor's motives as nefarious. As I stated in my dissent from the prior opinion, in which the majority granted the writ, the evidence against Girts was overwhelming and the prosecutor's statements were neither flagrant nor prejudicial. *Girts v. Yanai*, 501 F.3d 743, 761-62 (6th Cir.2007) (Batchelder, J., dissenting). But, though I did not then and do not now agree with the majority on these underlying facts, this disagreement is ultimately irrelevant to the present appeal.

jurisdiction under § 2254." *Id.*; *cf. Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir.2006) ("[W]hen a state meets the terms of the habeas court's condition, thereby avoiding the writ's actual issuance, the habeas court does not retain any further jurisdiction over the matter."); *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir.1985) ("Since Fisher was no longer being held pursuant to the constitutionally defective conviction, we conclude that the district court erred in ordering Fisher's release and barring retrial.").

The majority rejects this plain reading of *Eddleman* in favor of a view that a federal district court, acting under § 2254 habeas jurisdiction, can indeed go back and amend or clarify its prior judgment even after the State has released the petitioner, and supports this proposition with citation to and discussion of *Satterlee v. Wolfenbarger*, 453 F.3d 362 (6th Cir.2006). To the extent that *Satterlee* actually stands for this proposition-and I do not agree that it does-it lies in direct conflict with *Pitchess v. Davis*, 421 U.S. 482, 490, 95 S.Ct. 1748, 44 L.Ed.2d 317 (1975) ("Neither Rule 60(b), 28 U.S.C. § 2254, nor the two read together, permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court."), and is therefore null *ab initio*. But the district court in *Satterlee* did not render a decision after the State had released Satterlee; the district court granted an unconditional writ, the State then released Satterlee, and the State appealed the district court's grant of the writ. *See Satterlee*, 453 F.3d at 362. That the appeal continued after the petitioner's release is as irrelevant here as it was there, and as it

was in *Eddleman*. No one contends that we lack jurisdiction to review the decision on appeal. *See Carafas v. LaVallee*, 391 U.S. 234, 238, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968) ("[O]nce the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of [the appeal].").

The district court granted Girts a conditional writ on April 14, 2008, and then granted him an unconditional writ on November 3, 2008. The State released Girts on November 5, 2008, so the district court had issued both of those orders while Girts was still in custody.[2] Moreover, both writs offered the same remedy: release from custody. Neither writ stated or even suggested that the State could not retry Girts, which is to be expected as it is generally understood that "the state is not precluded from re-arresting [a] petitioner and re-trying him under the same indictment." *Satterlee*, 453 F.3d at 370; *Fisher*, 757 F.2d at 791 ("[H]olding a conviction invalid and granting the writ do not generally bar retrial on the original charge."). If Girts was unhappy with the remedy he should have appealed the April 14 order granting the conditional writ, *see Gentry*, 456 F.3d at 692 (noting that "[c]onditional grants of writs of habeas corpus are final orders"), or the November 3 order granting the unconditional writ, which would have followed the approach taken in *Satterlee*. But Girts did

2. It was only after the State had released Girts from custody—on November 5, 2008—that the district court issued the order under consideration in this appeal (also on November 5, 2008).

not appeal either of those orders. Girts appealed the November 5 order purporting to clarify the November 3 order; an order the district court issued after its jurisdiction had expired.

The simple conclusion is that the district court did not have jurisdiction to enter the November 5 order. In finding that the district court did have jurisdiction, the majority miscasts both *Eddleman* and *Satterlee*. I believe that *Eddleman*, 586 F.3d at 413, stands for the proposition that a district court's habeas jurisdiction expires after it has granted the writ and vacated the conviction, and the State has released the petitioner, whereas *Satterlee*, 453 F.3d at 370, stands for the unremarkable proposition that a party can appeal the grant of an unconditional writ. Therefore, I disagree with the majority's conclusion that the district court had jurisdiction to issue the November 5 order and I reject its bases for reaching that conclusion.

As for the proposition that a federal habeas court has the power to use untimeliness as a ground for barring a State from retrying a successful habeas petitioner, *Satterlee* certainly advances *that* proposition, stating: "[I]n extraordinary circumstances, such as when the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or if the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial, a habeas court may forbid reprosecution." *Satterlee*, 453 F.3d at 370 (quotation marks omitted) (quoting 2 HERTZ & LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND

PROCEDURE § 33.3 at 1685-86 (5th ed.2005)). Other circuits have accepted this proposition as well, though ours is the only one to do so since the enactment of AEDPA. *See, e.g., Capps v. Sullivan*, 13 F.3d 350, 352 (10th Cir.1993) ("In this circuit, barring a new trial is a permissible form of judgment."); *Foster v. Lockhart*, 9 F.3d 722, 727 (8th Cir.1993) (holding that "[a] district court has authority to preclude a state from retrying a successful habeas petitioner"); *Heiser v. Ryan*, 951 F.2d 559, 564 (3d Cir.1991).

But this view, which grants the district courts ultimate authority over state courts and state prosecutors, appears inconsistent with the, admittedly sparse, statements the Supreme Court has offered on this issue historically. In 1890, the Court was plain and direct: "[I]t is neither our inclination nor our duty to decide what the [state] court may or what it may not do in regard to [retrial]." *In re Medley*, 134 U.S. 160, 173, 10 S.Ct. 384, 33 L.Ed. 835 (1890). More recently, in 1963, the Court elaborated on its view of the habeas power: "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner." *Fay v. Noia*, 372 U.S. 391, 430-31, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) (dicta), overruled in part on other grounds by *Wainwright v. Sykes*, 433 U.S. 72, 87-88, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), and *Coleman v. Thompson*, 501 U.S. 722, 750-51, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). While the Court has generally expanded the reach of

habeas over time (though Congress expressly restricted its reach with the enactment of AEDPA), it has yet to refute the above-quoted expressions of its opinion and it has never spoken directly on the question of whether a federal district court can use untimeliness or delay as a ground to bar a state from retrying a successful habeas petitioner.

Finally, the majority addresses Girts's claims that a third trial would violate the double jeopardy clause, his right to a speedy trial, and due process, despite the State's insistence that Girts has never before raised these claims. The majority chose to "entertain" these questions on the basis that it has "discretion to entertain novel questions" and cites *Friendly Farms v. Reliance Insurance Co.*, 79 F.3d 541, 545 (6th Cir.1996). Ordinarily, however, we do not have discretion to entertain novel questions on habeas review. Ordinarily, "[t]he petitioner must first exhaust the remedies available in state court by fairly presenting his federal claims to the state courts; unexhausted claims will not be reviewed by a federal court." *Wilson v. Mitchell*, 498 F.3d 491, 498 (6th Cir.2007).

Indeed, we suggested just such a problem in *Eddleman*, explaining: "In its order unconditionally granting the writ, however, the district court proceeded effectively to adjudicate a speedy-trial claim that had never been presented to, much less ruled upon by, the Michigan state courts. With due respect, the district court acted out of turn in doing so." *Eddleman*, 586 F.3d at 413; *see also Flenoy v. Russell*, 902 F.2d 33 (table),

1990 WL 61114, *3 (6th Cir. May 8, 1990) ("Even if we construe [the] petitioner's argument as a claim that his Sixth and Fourteenth Amendment rights were violated by the delay before his retrial, we still must reject it, without prejudice, because he has not yet exhausted his state remedies."). By ruling on these habeas claims that have never been presented to the state court, the majority has also acted out of turn.

Therefore, while I agree with the majority that it would be improper for the district court to bar the State of Ohio from retrying Robert Girts, I cannot join its reasoning. I do not agree that the district court had jurisdiction to render a judgment binding on the State after Girts had been released pursuant to the writ. Moreover, I tend to think that the authority granted to the district courts allowing them to bar the states from retrying successful habeas petitioners is inconsistent with the Supreme Court's view of the habeas power. And, finally, I cannot join the majority's consideration of Girts's new habeas claims that have not been presented to or exhausted in the state court.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIN, EASTERN DIVISION DATED NOVEMBER 6, 2008

UNITED STATES DISTRICT COURT,
N.D. OHIO, EASTERN DIVISION.

No. 02-CV-00264.

Robert GIRTS,

Plaintiff,

v.

Chris YANAI, Warden,

Respondent.

Nov. 6, 2008.

MEMORANDUM & ORDER

KATHLEEN McDONALD O'MALLEY, District Judge.

On November 4, 2008, Respondent Chris Yanai filed an oral motion for clarification of this Court's Order granting Petitioner's motion for an unconditional writ of habeas corpus (Doc. 50). Respondent asked this Court whether the Petitioner may be retried. For the foregoing reasons, this Court has determined that the interests of law and justice ***DO NOT BAR*** the retrial of

Mr. Girts, but ***BAR*** the State from detaining Mr. Girts unless and until such time as the State can secure a constitutional conviction against him .[1]

I. BACKGROUND

On February 9, 1993, the Petitioner was indicted for aggravated murder in Cuyahoga County, Ohio. Although a jury convicted Mr. Girts of murder, the Court of Appeals of Ohio reversed this conviction. *Ohio v. Girts*, No. 65750, 1994 Ohio App. LEXIS 3318, at *28-29 (Ohio Ct.App. June 28, 1994). That court was troubled by prosecutorial conduct that "fl[ew] in the face of the Constitution." *Id.* At trial, the prosecutor had alleged that Mr. Girts' confessed guilt to another prisoner, but did not produce the prisoner for questioning. Perhaps most disturbingly, the prosecutor made this allegation despite the absence of a good faith belief that Mr. Girts had confessed. *Id.* at *31-32. On cross examination, the prosecutor entered into the following colloquy with Mr. Girts:

> Q. Isn't it a fact that you told a prisoner in county jail on the early morning hours of

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1. There are three distinct orders that can properly be issued by a habeas court. First, the court can issue a conditional writ of habeas corpus (*see* Doc. 41). *See Satterlee v. Wolfenbarger*, 453 F.3d 362, 365 (6th Cir.2006). Second, if this condition is not met, the court then issues an unconditional writ of habeas corpus (*see* Doc. 50). *Id.* at 368. Finally, in extraordinary circumstances, a habeas court may bar retrial of the petitioner. *Id.* at 370; *see also Capps v. Sullivan*, 13 F.3d 350 (10th Cir.1993).

Appendix B

> February, 19—I'm sorry—February 11, 1993 that you killed your wife but that the State would never be able to prove it?
>
> A. No, sir, that's incorrect.
>
> Q. It's incorrect? Do you recall being in the same pod with an individual by the name of Terry Lindsay?
>
> A. I don't know Mr. Lindsay, Sir.
>
> Q. How about a white male approximately 48 years old, beard, had a bad leg. Does that refresh your memory?
>
> A. No, sir, it doesn't.

Id. at *23. Given the prosecutor's failure to produce Mr. Lindsay, the State court properly considered this exchange a violation of Mr. Girts' constitutional right to confront witnesses against him and reversed Mr. Girts' conviction on June 28, 1994. *Id.*

Following the reversal of this conviction, the State retried Mr. Girts and secured a second conviction on August 9, 1995. This second conviction was obtained, however, only after the State repeatedly "implied that [Mr. Girts] was obligated to testify and speak to the police." *Girts v. Yanai*, 501 F.3d 743, 756 (6th Cir.2007). The Sixth Circuit found that "[t]he prosecutor's three statements were improper, misleading and highly

prejudicial." *Id*. Indeed, the Sixth Circuit explained that "[Mr. Girts'] silence was a central theme in the prosecutor's closing argument." *Id.* There was, accordingly, a "very strong likelihood that [the] prosecutor's prejudicial statements misled the jury." *Id.*

Consequently, on September 5, 2007, the Sixth Circuit instructed this Court "to order Petitioner's release from custody unless the State of Ohio grants Petitioner a new trial within 180 days." *Id*. at 761.[2] The State successfully sought one stay of the Sixth Circuit's mandate, but never sought to renew this stay and, on March 12, 2008, the Sixth Circuit issued its mandate. On April 14, 2008, this Court complied with that mandate and entered an Order stating:

> Petitioner's application for a writ of habeas corpus is **CONDITIONALLY GRANTED** as follows. Unless the State of Ohio grants Petitioner a new trial within 180 days from the date of this Order, Petitioner is to be released from custody at that time.
>
> Doc. 41 (emphasis in original). On its face, this Order required the state to empanel a new jury within 180 days, a little over a year after the Sixth Circuit's initial Order requiring that the State provide Mr. Girts with a new trial.

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2. The Sixth Circuit granted this conditional writ because Mr. Girts demonstrated that trial counsel had been constitutionally ineffective for failing to raise the Fifth Amendment claim. *Girts*, 501 F.3d at 756.

The State failed to comply with this conditional writ and failed to take any steps towards ensuring compliance[3] Instead, on October 14, 2008 (after the conditional writ expired), the State arranged a pretrial conference. Trial Counsel was appointed for Mr. Girts only very shortly prior to this conference, was able to spend less than 5 minutes conferring with Mr. Girts before the conference, and had no particular knowledge of Mr. Girts' case when the conference occurred.[4] At that pretrial conference, moreover, no trial date was set for this matter.

On November 4, 2008, the State called this Court seeking clarification regarding the scope of the Court's unconditional writ of habeas corpus (Doc. 50). In particular, the State asks this Court whether it intended to bar a new trial for Mr. Girts when issuing its

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3. Three business days prior to the expiration of the 180 day clock, the State moved this court for an extension of time to comply with the writ (Doc. 43), which the Court initially granted. Shortly thereafter, however, upon reconsideration, it became clear to this Court that it had no power to grant such an extension. (Doc. 50.) It was then that this Court issued the unconditional writ that is the subject of this motion. (*Id.*) The State does not contend, nor does any evidence suggest, that the State could have retried Mr. Girts more quickly had this Court not erroneously granted the State's motion for an extension of time.

4. While one motion was made at this pretrial conference, habeas counsel asserts that trial counsel only made this motion at the strong suggestion of habeas counsel. Habeas counsel is not representing Mr. Girts in his criminal proceedings.

unconditional writ. Furthermore, although the State was vague on this fact, it is the Court's understanding that the State wishes to detain Mr. Girts immediately following his release and to continue that detention at least until his apparently not-yet-scheduled third trial is completed.

II. ANALYSIS

A district court that receives a meritorious habeas petition is confronted with an individual detained in violation of the constitution or laws of the United States. A habeas court's role, however, is to "repair the constitutional deprivation," rather than simply to order a detainee released from custody. The modern practice when granting a writ of habeas corpus is to "give the State [ ] time to replace an invalid judgment with a valid one." *Wilkinson v. Dotson*, 544 U.S. 74, 87, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005) (Scalia, J., concurring). If the State fails to replace the invalid judgment in the allotted time period, only then is the consequence release. *Id.*

A habeas court's power "is not limited to ordering a prisoner's discharge from physical custody." *Saterlee*, 453 F.3d at 370. District courts possess the broad discretion to "dispose of the [habeas petition] *as law and justice require.*" *Id.* (emphasis in original) (citing 28 U.S.C. § 2243). It is only rarely appropriate, however, to use this discretion to bar retrial-federal courts "usually permit rearrest and retrial after the time period specified in the conditional release order has elapsed

and the prisoner has been released." *Id.* (citations omitted). An order barring retrial should be issued only in "extraordinary circumstances." *Id.* (citations omitted). The Sixth Circuit has stated that this occurs when "the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or if the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial." *Id.* (citations omitted).

The State contends that its actions during the 180-day conditional writ do not rise to the level of abuse, nor do they prejudice Mr. Girts. Mr. Girts, conversely, focuses this Court's attention to the inherent problem posed by a rule that effectively allows the State to ignore a conditional writ and face no consequences for having done so. His counsel argues:

> If the State were correct, and it could retry Mr. Girts for yet a third time, the 180 day deadline would be an empty vessel because there would be no consequence for the State's failure to comply with the writ's express condition. Accepting the State's position would completely undermine the purpose of a habeas petition when a State could, in essence, effectively grant itself an extension of the habeas deadline by ignoring this Court's ordered deadline and then retrying Mr. Girts upon his release from custody. At its core, the State asserts that it has the authority to defy this Court's Order with no real consequences. This simply does not square with the remedial purpose of habeas relief.

Appendix B

(*See* E-mail from Matthew Ridings (Nov. 4, 2008, 8:23pm).)[5] This Court cannot disagree with the logic of counsel's position, particularly in light of the prosecutorial misconduct that has been the hallmark of the State's prior two convictions. Sixth Circuit law, however, is to the contrary. Courts must reserve the "drastic remedy [barring reprosecution] for the most outrageous cases where ... the State remains passive in the face of accumulating prejudice to the petitioner." *Scott v. Bock*, No. 99-10274, 2008 U.S. Dist. Lexis 73124, at *12 (E.D.Mich. Sept. 12, 2008) (citation omitted); *See also Saterlee*, 453 F.3d at 370.

Generally speaking, the appropriate remedy offered by a habeas court in the face of gross procedural misconduct is a new trial free of such misconduct. This Court first ordered that remedy on April 14, 2008. (*See* Doc. 41.) The question before this Court is whether the State's conduct in the time since that Order is abusive or "likely to prejudice the petitioner." *Saterlee*, 453 F.3d at 370. A bar forbidding retrial is only justified when "the constitutional violation [is] such that it cannot be remedied by another trial, or other exceptional circumstances exist such that the holding of a new trial would be unjust." *Capps*, 13 F.3d at 352-53.

Though an extremely close question on these facts, the Court concludes that the State's conduct falls just short of the type of abuse contemplated by *Saterlee*. Certainly, there is little for this Court to praise in the

5. This e-mail was transmitted to both the Court and State.

State's conduct. Given the backdrop of a case with such extreme prosecutorial misconduct at two separate trials, this Court would have expected the State to be particularly diligent with respect to the habeas process and Mr. Girts' third trial. Instead, the State neglected the various appropriate options at its disposal. The State could have sought an additional stay of the Sixth Circuit's mandate or simply provided Mr. Girts with a lawful trial, but failed to pursue either option.[6]

Furthermore, the State's conduct since realizing its noncompliance has been troubling. Not only has the State apparently held a "pretrial hearing" without any clear intention of moving this case forward, the State also appears intent on securing a state court order that it hopes will prevent this Court from entering a Bar Order if it should find such an order appropriate -i.e., if it should conclude that the State's conduct in this case has, indeed, been extraordinarily abusive. Specifically, Mr. Girts' habeas counsel informed the Court that, after being told that this Court would issue a written Order addressing the pending motion by no later than noon tomorrow, the Assistant Attorney General assigned to this matter arranged a hearing in state court for 10 a.m. While this Court is rarely surprised when litigants engage in forum shopping, the Court is shocked in this instance. First, the Court simply expects more from the

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6. The State has suggested, both orally and in prior moving papers, that it failed to comply with the conditional writ because various Assistant Attorney Generals failed to communicate with each other. This explanation does not excuse noncompliance with a court order.

Attorney General than from a "typical" litigant. Second, the State itself asked this Court for the very ruling it is now apparently trying to avoid.[7]

The Court also takes note of the lengthy period of time during which Mr. Girts has been in jail following constitutionally infirm convictions. Mr. Girts has been imprisoned for fifteen years. The State has now had three opportunities to establish the Petitioner's guilt (twice at trial and once in response to this Court's conditional writ), yet has failed to do so. In light of these three failed attempts, the strength of the evidence regarding Mr. Girts' guilt is particularly relevant. The Court is mindful that the Sixth Circuit has noted that the State's case consisted of "weak and limited evidence." *Girts*, 501 F.3d at 757. That panel said:

> The record shows that Petitioner was out of state when his wife died. The prosecutor also had little, if any, evidence concerning the alleged ingestion of cyanide. More specifically, during the first autopsy, the toxicology test for cyanide did not yield a positive result. Although the second toxicology test yielded a positive result for cyanide, Petitioner's wife did not exhibit physical symptoms of cyanide poisoning.

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7. The State was under no obligation to seek clarification of this Court's ruling. Having taken that step, however, it is inappropriate for the State to seek to bypass this Court exclusively because the State anticipates that it may not like the clarification it receives.

Id. at 761. It is at least possible, accordingly, that the State has been unable to secure a lawful conviction of Mr. Girts because the State will never be able to secure a lawful conviction of Mr. Girts.

On the other hand, and ultimately dispositively, the Court cannot say that the current delay prejudices Mr. Girts's defense relative to a new trial held within the initial 180-day window.[8] For this reason, the Court will

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8. The case law is unclear regarding whether a district court may only bar retrial when a new trial would cause actual prejudice to the petitioner. *Satterlee* contains language indicating that prejudice is not a requirement in the presence of extraordinarily unjust conduct by the State, whereas other courts appear to require prejudice. *Compare Satterlee*, 453 F.3d at 370 (stating that a bar order is appropriate when the State "abusively fails to act . . . *or* is likely to prejudice the petitioner's ability to mount a defense") (emphasis added) *with Capps*, 13 F.3d at 353 ("[B]ecause nothing in the record suggests the constitutional violation was not redressable in a new trial, the district court apparently abused its discretion [by barring retrial.]"). Whether a necessary prerequisite or simply a factor to consider, this Court believes prejudice is a weighty concern in light of the extraordinary nature of an order barring retrial. In this case, the apparent absence of any prejudice to Mr. Girts's ability to mount a defense tilts the scales against a bar order.

The Court is mindful of the apparent paradox that, because fifteen years have passed since Mr. Girts' initial indictment, Mr. Girts is less prejudiced by an additional delay in his trial less than some other petitioner might be. This counterintuitive result exists only because of the unique considerations undertaken by a habeas court evaluating whether to bar retrial.

(Cont'd)

not bar the State from securing a lawful conviction against Mr. Girts if it is able to do so. *See Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir.1985) ("[H]olding a conviction invalid and granting the writ do not generally bar retrial on the original charge."). Nevertheless, mindful of the extreme prosecutorial misconduct that underlies the State's first two convictions of Mr. Girts, the State's conduct in apparently attempting to bypass this Court's current ruling, the State's failure to even attempt to secure a lawful conviction when given a third opportunity to do so, and the possibility that the State never will be able to secure a lawful conviction of Mr. Girts, this Court will not allow the State to detain Mr. Girts while it attempts to obtain a lawful conviction. *See Satterlee*, 453 F.3d at 370 ("The habeas statute provides that "[t]he court shall . . . dispose of the matter as *law and justice require.*" Based on this broad language, the Supreme Court has explained that the remedial power possessed by habeas courts is not limited to ordering a prisoner's discharge from physical custody.") (emphasis in original) (citations omitted). Ultimately, the Court concludes that "law and justice require" an Order prohibiting further pre-trial detention of Mr. Girts.[9]

(Cont'd)

This Court does not suggest that the question of prejudice should be evaluated in this manner by a court in other contexts, such as the right to a Speedy Trial or the right to Due Process.

9. This Court does not suggest, of course, that a State court may not take appropriate action to ensure that Mr. Girts is available for trial. Such action, however, must be narrowly tailored to that exclusive goal and may not include an order of detention.

III. CONCLUSION

For the foregoing reasons, this Court has determined that the interests of law and justice ***DO NOT BAR*** the retrial of Mr. Girts, but ***BAR*** the State from detaining Mr. Girts unless and until such time as the State can secure a constitutional conviction against him.

IT IS SO ORDERED.